VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
WILLIAM HAROLD BUTTERFIELD VSB DOCKET NUMBER 05-000-1513

ORDER AND OPINION

This matter came before the Virginia State Bar Disciplinary Board on November 19, 2004 upon an Agreed Disposition to impose Reciprocal Discipline, as a result of a Rule to Show Cause and Order of Suspension and Hearing entered on October 22, 2004. A duly convened panel of the Virginia State Bar Disciplinary Board consisting of Robert L. Freed, Esquire (1st Vice Chair), V. Max Beard (lay member), Bruce T. Clark, Esquire, Ann N. Kathan, Attorney at Law, and Russell W. Updike, Esquire, heard the matter. Paul D. Georgiadis, Assistant Bar Counsel, appeared as Counsel to the Virginia State Bar ("VSB"). The Respondent, having entered an appearance *pro se* and having received due notice, did not appear before the Board. This matter was recorded by Chandler & Halasz Court Reporters, P.O. Box 9349, Richmond, Virginia 23227, (804) 730-1222.

Having considered the Agreed Disposition to the imposition of Reciprocal Discipline, the Board finds by clear and convincing evidence as follows:

STIPULATIONS OF FACTS

1. At all times relevant hereto, the Respondent, William Harold Butterfield, Esquire (hereinafter Respondent) has been an attorney licensed to practice law in the Commonwealth of Virginia.

2. On June 17, 2004, the District of Columbia Court of Appeals entered an order suspending the Respondent's license to practice law in the District of Columbia for a

period of thirty days effective July 17, 2004. The order became final and Respondent was so suspended .

3. In entering its order, the District of Columbia Court of Appeals accepted the findings of the District of Columbia Board on Professional Responsibility ("D.C. Board") in finding that Respondent violated Rules 1.7(b)(1) and 1.7(b)(2) of the District of Columbia Rules of Professional Conduct when he failed to perform a conflicts check and failed to obtain written consents, or to withdraw, once he learned of a conflict of interest.

4. The D.C. Board found that Respondent refused to acknowledge and resolve a conflict requiring waivers from two affected clients when Respondent proceeded to represent a new client, Raytheon Corporation, in filing a bid protest against a proposal by the Federal Aviation Administration to grant a sole source contract to Lockheed Systems Integration. Lockheed Systems Integration was an existing client of Respondent's firm. Lockheed lodged the ethics Complaint.

5. This Board hereby adopts the Joint Stipulation of Facts which incorporates by reference the findings of the D.C. Court of Appeals and the D.C. Board, attached hereto as Exhibits A-1 and A-2.

STIPULATIONS OF MISCONDUCT

The aforementioned conduct on the part of the Respondent constitutes a violation of the following Rule of Professional Conduct:

RULE 1.7 Conflict of Interest: General Rule

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third

person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Upon consideration of the Agreement to Imposition of Reciprocal Discipline before this panel of the Disciplinary Board, it is hereby ORDERED that, pursuant to Part 6, § IV, ¶ 13(I)(7) of the *Rules of Virginia Supreme Court*, the license of Respondent, William Harold Butterfield, Esquire, to practice law in the Commonwealth of Virginia shall be, and is hereby, suspended for a period of thirty days, commencing October 22, 2004.

IT IS FURTHER ORDERED that, as directed in the Board's October 22, 2004 Order in this matter, a copy of which was served on the Respondent by certified mail, the Respondent must comply with the requirements of Part 6, § IV, ¶ 13(M) of the *Rules of Virginia Supreme Court*. The time for compliance with said requirements runs from October 22, 2004, the effective date of the Order of Suspension. All issues concerning the adequacy of the notice and arrangements required by that Order shall be determined by the Board.

It is FURTHER ORDERED that the Clerk of the Disciplinary System shall send an attested and true copy of this order and opinion by certified mail, return receipt requested, to Respondent, William Harold Butterfield, Esquire at Bell, Boyd & Lloyd, Suite 1200, 1615 L. Street, NW, Washington, DC. 20036, and by hand to Paul D. Georgiadis, Assistant Bar Counsel, 707 E. Main Street, Suite 1500, Richmond, VA, 23219.

The Clerk of the Disciplinary System shall assess costs pursuant to Part 6, § IV, ¶ 13(B)(8) of

the *Rules of Virginia Supreme Court.*

SO ORDERED, this 19 day of November, 2004.

By: Robert L. Freed, First Vice Chair

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 03-BG-578

IN RE WILLIAM H. BUTTERFIELD, RESPONDENT.

A Member of the Bar of the
District of Columbia Court of Appeals

On Report and Recommendation
of the Board on Professional Responsibility

(BDN264-99)

(Submitted May 18, 2004 Decided June 17, 2004)

Before FARRELL and REID, *Associate Judges*, and FERREN, *Senior Judge*.

PER CURIAM: The Board on Professional Responsibility, in accord with the Hearing Committee, has found that respondent, William H. Butterfield, violated Rule 1.7 (b)(1) and (2) of the District of Columbia Rules of Professional Conduct when he failed to perform a conflicts check and failed to obtain written consents, or to withdraw, once he learned of the conflict. The Board recommends that respondent be suspended from the practice of law for thirty days. Two members dissented and recommended a sixty-day suspension with a requirement that respondent take three hours of continuing legal education in the area of ethics and professional responsibility.

Bar Counsel has informed the court that she takes no exception to the Board's report and recommendation. Respondent filed a statement saying that he will not file any exception.

This court will accept the Board's findings as long as they are supported by substantial evidence in the record. D.C. Bar R. XI, § 9 (g)(1). Moreover, we will impose the sanction

recommended by the Board "unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or would otherwise be unwarranted." *Id.* Respondent's failure to file any exception to the Board's report and recommendation increases this court's already substantial deference to the Board. D.C. Bar R. XI, § 9 (g)(2); *In re Delaney*, 697 A.2d 1212, 1214 (D.C. 1997).

We find substantial support in the record for the Board's findings, and, accordingly, we accept them. The record substantiates that respondent did not perform a conflicts check in the regular course of business, and that in this case he failed to make a preliminary check, and further failed to take action once he was fully aware of the conflict. More specifically, he failed to notify the affected parties and attempt to obtain waivers or, failing that, to withdraw from representation of the new client. We adopt the sanction recommended by the Board. Especially when considered in light of respondent's election not to take exception to the board's recommendation, the proposed sanction cannot be held inconsistent with discipline recommended in comparable cases. *See In re Cohen,* No. 02-BG-863 (April 29, 2004) (thirty-day suspension for conflict-of-interest violation and failure to supervise firm attorney responsible for false statement to a tribunal); *compare with In re Shay*, 756 A.2d 465 (D.C. 2000) (ninety-day suspension for conflict and dishonesty) and *In re Jones-Terrell*, 712 A.2d 496 (D.C. 1998) (sixty-day suspension for conflict and other violations, including dishonesty). Accordingly, it is

ORDERED that William H. Butterfield is suspended from the practice of law in the District of Columbia for the period of thirty days, effective thirty days after the date of this order. We direct respondent's attention to the requirements of D.C. Bar R. XI, § 14 (g), and

their effect on his eligibility for reinstatement. *See* D.C. Bar R. XI, § 16 (c).

So ordered.

A true Copy
Test:

Garland Pinkston, Jr.
Clerk of the District of Columbia Court of Appeals

BY _____
DEPUTY CLERK

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
WILLIAM H. BUTTERFIELD,	:	Bar Docket No. 264-99
Respondent.	:	

REPORT AND RECOMMENDATION OF THE BOARD
ON PROFESSIONAL RESPONSIBILITY

This matter comes before the Board on Professional Responsibility (the "Board") on review of the Report of Hearing Committee Number Ten, which concluded that Respondent had violated Rule 1.7(b)(1) of the D.C. Rules of Professional Conduct ("Rules") and recommended that Respondent be suspended from the practice of law for thirty days and that his reinstatement be conditioned on completion of a course on professional responsibility approved by Bar Counsel. The Board concurs in the recommendation of the Hearing Committee both as to violation and as to sanction.

This case presents a straightforward law firm conflict of interest situation. Respondent refused to acknowledge and resolve a conflict requiring waivers from two affected clients and proceeded to represent a new client in a matter in which its interests were adverse to the interests of an existing law firm client. Respondent's law firm routinely failed to utilize its conflict identification system and it failed to take effective action to address the conflict. When the conflict was ultimately disclosed, the firm's existing client terminated the firm and lodged with Bar Counsel the complaint which initiated this proceeding.

I. PROCEDURAL BACKGROUND

Respondent is a member of the District of Columbia Bar, having been admitted on May 25, 1970. Bar Counsel filed a petition initiating formal disciplinary proceedings on May 30, 2000. Bar Counsel charged that Respondent violated Rule 1.7(b)(1) (representation of one client, without the consent of both clients, adverse to the position taken by another client in the same matter); Rule 1.7(b)(3) (representation of one client, without the consent of both clients, where the representation of another client will be or is likely to be adversely affected by such representation); and Rule 1.10(a) (knowing representation of a client when another firm lawyer would be prohibited from doing so by Rule 1.7).

The Hearing Committee conducted hearings on September 18, and October 16, 2000. Bar Counsel submitted exhibits and called as witnesses Maryanne Lavan, Vice President and General Counsel of Lockheed Systems Integration ("Lockheed"), the complaining party; two of Respondent's current law partners, Peter M. Kilcullen and Walter Wilson; one former partner, Patricia Wittie; and Ms. Brenda Touhey. (Respondent's former partner Thomas Touhey, who represented Lockheed, became sick and died within months after the conflicting representation occurred.) Respondent testified at the request of the Hearing Committee, and the Hearing Committee's report was issued on February 25, 2002. Respondent excepted to the Report, both as to the violations findings and as to sanction.

Oral argument was heard before the Board on September 5, 2002.

II. FINDINGS OF FACT

The Hearing Committee Report includes comprehensive and detailed findings of fact, which are supported by the record. We adopt the Hearing Committee's findings and present them here, as supplemented where necessary by our own findings.[1]

1. In 1999, Respondent was an equity participant in the law firm of Kilcullen, Wilson & Kilcullen, Chartered (the "Firm"), a Washington, D.C. law firm specializing in government contracts matters.[2] Between January and May 1999, when the situation at issue arose, the Firm consisted of approximately twelve lawyers, ten of whom were principals. The bulk of the Firm's work involved matters in which the United States was the adverse party. The Firm did, however, represent clients in bid protests and other matters in which commercial entities were adverse to one another. At the time of the hearing, Respondent was a partner in the law firm of Bell, Boyd & Lloyd, as were Peter Kilcullen and Walter Wilson, the name partners in the Firm.

2. Representation of the New Client Raytheon. For a period of time prior to April 1999, Respondent had been trying to acquire Raytheon Corporation ("Raytheon") as a Firm client for government contracts work. On or about April 14, 1999, Respondent was contacted by Raytheon about filing a bid protest against a proposal by the Federal Aviation Administration ("FAA") to grant a sole source contract to Lockheed. At the time of this contact, Respondent was in Louisville on other business. Since bid protests have to be filed within ten days of the award of the contract, Respondent alerted Cyrus Phillips, one of his partners, so that the Firm

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[1] We have reviewed, but do not recite, the Hearing Committee's citations to the record. Pursuant to Board Rule 13.7, we make certain additional findings of fact, based on "clear and convincing" evidence in the record. These additional findings are accompanied by citations to the record.

[2] The Firm was a chartered entity, not a partnership. For convenient reference, however, we refer to its members as "partners."

would be in a position to handle the protest if Raytheon should decide to go forward. Mr. Phillips commenced working on the Raytheon matter on Thursday, April 15, 1999, and Respondent started working on the Raytheon matter on Friday, April 16, when he returned to the office.

3. There is no evidence that Respondent knew at the time he was contacted by Raytheon that other members of the Firm, namely Thomas Touhey and Patricia Wittie, represented Lockheed in unrelated matters. Respondent took no action, however, before he commenced work for Raytheon to determine whether the representation of Raytheon would create a conflict of interest.

4. Despite the facts that, as outlined later in these findings, Respondent knew on April 16 that the Firm represented Lockheed and that two of his partners objected strenuously as early as May 4, Respondent continued to work on the protest through early May and ultimately filed the protest on May 21. He testified that, throughout this period, he was not certain that Raytheon would actually authorize the filing of the protest. Governmental contractors often make decisions as to whether to file a protest at the last minute, but because of time pressure associated with the ten-day deadline, Respondent needed to prepare the protest while Raytheon was deciding whether to file. The protest filed on May 21 sought the "termination of the single source award to Lockheed." B.C. Ex. 4(b) at 22.[3] The protest was settled shortly thereafter without the termination of the award to Lockheed.

5. Kilcullen, Wilson & Kilcullen's Conflict Clearance Procedures. The Firm had a written conflict identification procedure which it had developed in response to its malpractice insurance carrier's request. It also had an "ad hoc" or "oral" method of clearing conflicts. Under

[3] "B.C. Ex." is used to designate Bar Counsel's exhibits.

the written system, attorneys undertaking a new client or new matter completed an "Opening a New Client or Matter" form calling for information concerning the new client and parties who might be adverse. The information on the form was input into the Firm's database which was also used for billing.

6. The Firm's database was maintained by Peter Kilcullen's secretary, who could, if requested, search the database to determine whether a potential new client might create a conflict of interest. Tr.-2 at 45-51.[4] It appears, however, that the members of the Firm did not routinely call for a search of the database when a new matter or client was undertaken. Id. at 51-53.

7. Respondent did not have this database checked in this case, nor was it his practice to have the database checked for new clients or matters. Id. at 88. Indeed, Respondent himself did not prepare the case opening form for the Raytheon matter; the form was completed by a secretary who did not fill in the portions of the form designed to reveal conflicts; the "Description of Matter" and "Other Parties/Conflict Information" topics were left blank. As submitted, the form included only Raytheon's name, "Raytheon Systems Company," its address, and the designation of Respondent as "Billing Attorney." B.C. Ex. 4(a); Tr.-2 at 57-59. The data was not even entered into the Firm's database until May 12, 1999, only nine days before the protest was filed, and almost a month after work had commenced. As evidenced by this case, the Firm did not require attorneys to complete the form before undertaking work for a new client or on a new matter. Tr.-2 at 59-62. The form was not distributed within the Firm, nor was any e-mail or other documentary process used to identify conflicts. Tr.-1 at 31, 183-84.[5]

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[4] "Tr.-2" is used to designate the transcript of the hearing on October 16, 2000.

[5] "Tr.-1" is used to designate the transcript of the hearing on September 18, 2000.

8. The Firm's lawyers utilized their daily communications within the office as the primary method of identifying conflicts. Tr.-2 at 17-20. Mr. Kilcullen testified that the principal means of addressing a potential conflict situation was an "oral" or "word of mouth" notification procedure. Respondent concurred, stating that, to the extent the Firm had a conflict checking system, "it was 99% word of mouth." Id. at 79. Mr. Wilson testified that the Firm relied on word of mouth notification of new clients and matters. He said he would not call the Firm's conflict identification process a "system because that implied there was some sort of rule or written rule that you had to do that." Id. at 20.

9. The Conflict of Interest. When Respondent returned to his office on Friday, April 16, he found a note from Mr. Touhey stating he believed there was a conflict with Mr. Touhey's representation of Lockheed. Respondent immediately sought out Mr. Touhey and discussed the matter. During that conversation, Mr. Touhey expressed concern that Respondent's undertaking the Raytheon work would be a conflict since Mr. Touhey represented Lockheed. Respondent testified that the "whole premise" of this meeting was that Lockheed was a client of the Firm and that representation of Raytheon adverse to Lockheed created a problem. Id. at 115-16.

10. Respondent testified that Mr. Touhey was very vague as to the Lockheed matters on which he was working and could not name the attorney(s) at Lockheed he would contact about the conflict. *E.g.* Tr.-1 at 11-12; B.C. Ex. 8(l). Respondent states that he was not convinced, after the conversation on April 16, that there was a conflict. B.C. Ex. 8(l). Respondent knew, however, that Mr. Touhey had represented Lockheed in connection with a matter before the Armed Services Board of Contract Appeals ("ASBCA"), which was still pending but dormant. Tr.-2 at 91. Respondent stated that Mr. Touhey "hoped that if the pending case was unsuccessful, he was hopeful of getting retained to process the appeal." Id.

Respondent testified that he did not understand Mr. Touhey to be "putting a stake in the ground" that there was a conflict. Id. at 93. Respondent acknowledges, however, that the April 16 conversation did not resolve the issue. Tr.-1 at 12; Tr.-2 at 90, 93. In his memorandum of June 1, 1999, he concluded his description of this discussion as follows:

> In any event, this first meeting with Tom (which lasted probably 15 minutes at most) did not resolve anything. I still believe Tom felt there was a conflict, and I made it clear that I did not believe there was one.

B.C. Ex. 2. Notwithstanding that a potential conflict had been identified, Respondent continued to work on the Raytheon protest, logging 6.5 hours on April 16 and 4.0 hours on April 18. B.C. Ex. 9.

11. Respondent testified that on Monday, April 19, the next business day, Mr. Touhey came into Respondent's office and told him that he, Mr. Touhey, was "backing off." Tr.-2 at 93-96; B.C. Ex. 8(l). In his June 1, 1999 memorandum to Walter Wilson, Respondent described this conversation as follows:

> 4. The very next business day (which I believe was Monday, April 19), Tom came into my office. He stood directly in front of my desk and told me, point blank, that he was withdrawing his objection. I believe the exact phrase he used was that he was "backing off." I repeat, Tom told me to my face that he had no objection to our representation of Raytheon.

B.C. Ex. 2. On cross-examination, Respondent acknowledged that on April 19, Mr. Touhey did not say (a) there was no conflict, or (b) that Lockheed had ceased to be a Firm client, or (c) that the pending ASBCA matter had been resolved, or (d) that he (Mr. Touhey) had obtained a waiver from Lockheed, or (e) that he (Mr. Touhey) was withdrawing from the representation of Lockheed. Tr.-2 at 118-19.

12. Respondent agreed with a Hearing Committee member's characterization of his position as follows:

HEARING COMMITTEE MEMBER O'MALLEY:

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Is it a fair summary of your testimony, and I think that this is perhaps your fundamental position, I'm asking, is this a fair summary of it, that on April 16 and April 19, after your discussions with Mr. Touhey, while it appeared to you that Lockheed was a current client of Mr. Touhey, and that's what he was concerned about, that if, the client contact partner in the firm, decided and told you that there was not a problem, and he was backing off, that was all you needed to enable you to proceed.

THE WITNESS: That's exactly what I'm saying.

Tr.-2 at 97-98.

13. Respondent made no inquiry whether Lockheed was no longer a client, whether the case had been resolved, or whether Mr. Touhey had cleared the conflict with Lockheed. Id. at 118-20.

14. Mr. Wilson supported Respondent's testimony. He testified that Mr. Touhey told him on the same day, April 19, there was no conflict and that he did not even know who to contact at Lockheed to seek a waiver. Tr.-1 at 259. Mr. Wilson testified that he did not question Mr. Touhey further and made no independent effort to determine whether there was a conflict. Id. at 260.

15. Ms. Wittie, a partner in the Firm at the time this matter arose, described a different version of events. In a memorandum of May 14, 1999, she wrote that Mr. Touhey had left the first conversation with Respondent with the belief that Respondent had not yet landed the Raytheon representation. B.C. Ex. 6(e). Ms. Wittie testified that Mr. Touhey told her, when she called him at home on May 2 to advise that Respondent was working on the protest, that he thought that Respondent had only been approached about the possibility of representing Raytheon and that he had not commenced work. Ms. Wittie stated that Mr. Touhey first learned

that Respondent was actually working for Raytheon when she called Mr. Touhey on the evening of May 2 to discuss the conflict. Tr.-1 at 35-36.

16. Ms. Wittie had learned of Respondent's work for Raytheon when she found him in the office on May 2, a Sunday, and asked what he was doing. Respondent told her that he was working on a possible protest by Raytheon against the award of a sole-source contract to Lockheed. She testified that she was "astonished" by this information since she represented Danish Aerotech in a matter where Raytheon was adverse. Id. at 33, 34. She testified that she advised Respondent that his representation of Raytheon was a conflict with Danish Aerotech. Ms. Wittie stated she was also surprised that Respondent was working on a protest against Lockheed since she and Mr. Touhey were then currently working for Lockheed. Ms. Wittie testified that Respondent told her that he understood "there might be a problem because of Lockheed and Tom Touhey." Id. at 33.

17. During their call on the evening of May 2, Ms. Wittie and Mr. Touhey agreed to raise the conflict issue with Respondent early the following week. Ms. Wittie was in a deposition on Monday, May 3. On Tuesday, May 4, she and Mr. Touhey met with Respondent. Id. at 35, 38. According to Ms. Wittie, Respondent stated that "he was aware that Lockheed was on the other side, or would be potentially on that other side, but that this was potentially a huge piece of business that he couldn't afford to lose," Id. at 38-39. He said that "if it was necessary he would leave the Firm." Id. Respondent also "said that he would not disclose to Raytheon that there was work in-house on behalf of Lockheed because it would be the kiss of death." Id. at 37-39. Respondent acknowledges that he was angry and he does not dispute that he may have used those words, but denies that they were used in an exclusive money context and asserts that he

could not advise Raytheon of the conflict because of the short time remaining before the protest was to be filed. Id. at 20; B.C. Ex. 10 at 2.

18. The Raytheon-Danish Aerotech Conflict. Ms. Wittie was adamant in her position that the representation of Raytheon was a conflict with respect to Danish Aerotech as well as with Lockheed and she insisted on the Firm obtaining the necessary waivers. She also believed that Respondent needed to obtain a waiver from Raytheon first, before she could ask Danish Aerotech for a waiver, since any unauthorized disclosure of the Raytheon work might be revealing a client confidence or secret without consent.

19. On May 7, Respondent called his contact at Raytheon, Philip Radoff, to clear the Danish Aerotech matter. He followed the call with a confirming e-mail that indicated that he had advised Mr. Radoff of the conflict "in the interests of full disclosure." See B.C. Ex. 8(b); see also Tr.-1 at 51-52. The e-mail indicates that Respondent thought the conflict "was speculative, remote and wholly unrelated to anything I was doing," and that he "saw no conflict," although he acknowledged that Danish Aerotech and Raytheon were negotiating a contract and the negotiations were difficult and could result in litigation.[6] B.C. Ex. 8(b). Once Respondent received Raytheon's consent, Ms. Wittie obtained a waiver from Danish Aerotech. Notwithstanding his discussion with Raytheon about the Danish Aerotech conflict, Respondent never advised Raytheon that the Firm represented Lockheed.

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[6] The e-mail response from Raytheon indicated that it would have preferred Respondent to have cleared the conflict before undertaking the Raytheon work. Specifically, Phillip Radoff, Vice President-Legal, Raytheon, wrote:

> During the course of your present engagement (and any future engagement) on our behalf, we recommend that your firm screen future business prospects for interests potentially adverse to those of Raytheon and advise us before agreeing to go forward.

B.C. Ex. 8(e).

20. The Lockheed Representation. After their meeting with Respondent on May 4, Mr. Touhey and Ms. Wittie met with Mr. Kilcullen and Mr. Wilson to discuss the conflict. Mr. Kilcullen asked Mr. Touhey to prepare a memorandum setting forth the matters in which the Firm represented Lockheed. Mr. Touhey identified three Lockheed divisions which he represented: Electronic Sector-Long Island Operations; Government Electronic Systems Division; and a "division in Syracuse, New York, the name of which I do not know." B.C. Ex. 6(a). He listed four pending cases: (1) a claim against the Maritime Administration, which was pending but might be settled; (2) the defense of a subcontractor claim, which was "inactive but could come back at any time" B.C. Ex. 8(a); (3) the defense of another subcontractor claim; and (4) an ASBCA case awaiting decision which might involve an appeal. Mr. Touhey sent copies of this memorandum to Mr. Kilcullen, Mr. Wilson, Ms. Wittie and Respondent.

21. On May 8, Mr. Touhey sent another memorandum to Mr. Kilcullen and to Mr. Wilson, with copies to Ms. Wittie, and Respondent. Here, he stated that "Lockheed has been my strongest client and greatest revenue generator for ten years." B.C. Ex. 6(c). He wrote that he thought the Lockheed Air Traffic Control System, located in Gaithersburg, was most likely the division of Lockheed that would be the subject of the Raytheon protest. Acknowledging that he did no work for that division, he observed that:

> The fact that I have not worked for the Gaithersburg division doesn't really matter since Lockheed is one corporation.[7] In other words, I would have a conflict regardless of which division is performing the ATM contract. I am in the same position as Bill in that, if I tell them [Lockheed] we represent Raytheon in a matter against them, they will almost surely fire me.

[7] This statement was later confirmed by Ms. Lavan, who testified that each of Lockheed's operating divisions were divisions and not subsidiaries or affiliates. Lockheed is one corporation.

Id.; B.C. Ex. 8(c). Mr. Touhey's conclusion on this point was as follows: "The bottom line is that, if we are going to protest an award of a contract to Lockheed, I need to find a new home and I need to do so quickly." B.C. Ex. 6(c); B.C. Ex. 8(c).

22. The Firm's billing records indicate that, prior to March 1999, the Firm had little time on Lockheed matters. Prior to that month, Mr. Touhey and Ms. Wittie recorded only a few hours per month to Lockheed matters. In March, however, Mr. Touhey and Ms. Wittie recorded approximately 40 hours to Lockheed matters, in April they recorded approximately 26 hours, and in May they recorded 42.5 hours. B.C. Ex. 3.

23. Mr. Touhey had not been retained initially by Lockheed itself. Rather, he had been retained by companies which Lockheed had acquired over the years, principally Heritage Unisys. Lockheed had continued to employ him for those matters after the acquisitions. There was no evidence that Lockheed had retained Mr. Touhey or Ms. Wittie for any new matters.

24. Mr. Kilcullen testified that, until this conflict arose, he did not know that Lockheed was a client of the Firm. He subsequently learned that it was, but believed that the work for Lockheed was "de minimis" and that Mr. Touhey was "baby sitting" some cases.[8] Tr.-1 at 203, 208. Mr. Wilson also stated that he was not aware that Lockheed was a client.

25. The limited nature of Mr. Touhey's work for Lockheed was supported by the complainant, Ms. Lavan. She testified that the matters handled by Mr. Touhey related to a business Lockheed had terminated. Only one matter, the MATCALs case, a claim against the Maritime Administration, generated any significant interest within Lockheed.[9]

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[8] When he received billings to Lockheed, however, he learned that billings in April increased. Tr.-1 at 203-06.

[9] The case apparently required Lockheed to establish a reserve and there was some interest in the company in knowing whether the reserve had to be maintained. Tr.-1 at 122, 126.

26. The Debate within the Firm. During the days following receipt of Mr. Touhey's memorandum of May 8, 1999, Mr. Kilcullen attempted to resolve this dispute, urging both Respondent and Mr. Touhey to contact their respective clients. Mr. Wilson also encouraged both of them to contact their clients; he prepared a draft of a letter they might use.

27. Respondent took the position that there was no conflict and thus no need to contact Raytheon. He was of the view, which he has maintained throughout these proceedings, that Mr. Touhey had "backed-off" at the crucial point in his representation of Raytheon and that, in light of the protest deadline, he could not disclose the conflict and seek Raytheon's consent.

28. Ms. Wittie was steadfast in her view that there was a conflict and that it had to be cleared by Lockheed. While Respondent maintains that Mr. Touhey "backed off" on April 19, he acknowledges that as of May 4, Mr. Touhey shared Ms. Wittie's view. Tr.-2 at 97. Mr. Touhey's wife testified that he was very upset with developments at the Firm during this period and was concerned about his relationship with Lockheed. In a Memorandum sent to Messrs. Kilcullen and Wilson dated May 23, 1999, shortly after the protest was filed, Mr. Touhey stated:

> During my year and one half with the firm, we have had two conflict of interest problems which have, or have threatened to, drive attorneys from the law firm. It is not over yet ...
>
> In twenty-nine years of private law practice, I have never had this problem before. The reason is simple. None of the firms that I was a member of before, including the one I managed, ever took a case where there was even a hint of a conflict between clients. The problem is very easy to avoid. Compliance with ethical rules is much easier than not complying with them. The consequences of non-compliance are completely predictable as our experience in the last year and one half has shown. The consequences of future non-compliance will be much worse. The firm is only as good as its reputation, and its reputation is in danger. The attorneys who leave the firm because of this . . . are obligated to tell people why they did. They are not going to say that they were substandard performers. They are going to say that the ethical standards of the firm were not up to theirs. This is not something which we can afford.

B.C. Ex. 12.

29. Respondent and Mr. Kilcullen thought that, if Mr. Touhey and Ms. Wittie were concerned about the conflict, they should contact Lockheed. Mr. Touhey, with Ms. Wittie's support, maintained that he could not disclose the conflict to Lockheed without Raytheon's consent. They felt that the prospect that Raytheon might file a protest was a client confidence or secret which could not be disclosed without consent. Respondent took the position that he did not understand why Mr. Touhey or Ms. Wittie could not contact Lockheed. Mr. Kilcullen shared that view.

30. While acknowledging that there might be a conflict of interest, neither Mr. Kilcullen nor Mr. Wilson took effective action to address the matter. Neither thought it was his responsibility to contact either Raytheon or Lockheed in order to explore whether they would waive the conflict. It appears that Mr. Kilcullen believed that (a) there was no conflict (or that the problem would solve itself) if Raytheon ultimately decided not to file the protest,[10] (b) since Raytheon was using the protest as a means of achieving another objective, the interests of Lockheed and Raytheon were not really adverse, (c) since the Lockheed matters were largely dormant and Mr. Touhey did not know whom to contact, they did not need to obtain Lockheed's consent, or (d) that Mr. Touhey was in the best position to make the call as to whether there was a conflict since he would suffer the economic consequences.

31. In an e-mail to Mr. Wilson, dated June 4, 1999, Mr. Kilcullen stated:

> This is essentially a situation where our "representation" of Lockheed was "minimal and passive." We were awaiting a decision on 2 cases. Moreover, we had no "point of contact" within Lockheed to clarify the situation for us. We proceeded in good faith to represent Raytheon on the

[10] Respondent acknowledges that his preparations of drafts and telephone conferences with Raytheon were all adverse to Lockheed. Tr.-2 at 178-79.

> basis that any conflict was non-existent or de minimus. At this point we owe a "duty of loyalty" to Raytheon to see the protest through, . . .

B.C. Ex. 8(p). Mr. Kilcullen also testified that, if he had had to choose between Raytheon and Lockheed, he would have chosen Raytheon because it would have "provide[d] the greatest potential revenue to the firm." B.C. Ex. 8(f).

32. Mr. Kilcullen also noted that either Mr. Touhey or Respondent could have resigned from the Firm "if they wanted to continue either to represent those clients [Raytheon and Lockheed] or contact them and say, I could not represent you." Tr.-1 at 247. He testified that he "just didn't feel that I could make that choice for them for their livelihood." Id. He did state, however, that he told Mr. Touhey that, if Mr. Touhey lost Lockheed as a client, Mr. Kilcullen would take steps to minimize the impact on Mr. Touhey's compensation. He had advised Mr. Touhey that "if you thought that you may have collected, say, $50,000 from Lockheed for the rest of the year, we will take that into account – not necessarily mathematically, but we'll take it into account . . . ." Tr.-2 at 64.[11]

33. Mr. Wilson's views paralleled those of Mr. Kilcullen. He thought they had to clear the conflict or drop one of the clients, but also did not feel it was his role to resolve the issue or contact the clients. Indeed, Mr. Wilson appeared to believe that there was no "active" representation of Lockheed, but neither he nor Mr. Kilcullen checked any billing or other records. Tr.-1 at 298-300. (At the hearing, Mr. Wilson acknowledged that a conflict would exist if a client was awaiting a decision and the attorney expected to represent the client in any appeals.)

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[11] Partners in the Firm were compensated largely on the amount of revenue they generated. The partners shared the operating costs equally, but their income was a reflection of the revenue generated.

34. The Committee concluded that Mr. Wilson wanted nothing to do with the dispute and hoped that Mr. Touhey and Respondent would solve the problem. H.C. Report at 17. Both Mr. Wilson and Mr. Kilcullen thought that "Pat Wittie was stirring the pot" and that without her agitation this matter would never have arisen. Tr.-1 at 197.

35. The Raytheon Protest. Respondent filed the protest on behalf of Raytheon on May 21, 1999. It challenged the "propriety of a non-competitive, single source award by the FAA to Lockheed Corporation." B.C. Ex. 4(b) at 2-3. The relief sought was termination of the award to Lockheed. The protest further requested that the FAA either award the contract to Raytheon or conduct an expedited competition between Raytheon and Lockheed.

36. By letter of June 2, 1999, Respondent and counsel for the FAA advised the Office of Dispute Resolution for Acquisition that the parties had reached an agreement in principle to resolve the protest. B.C. Ex. 4(c). The protest was dismissed by order of June 11, 1999 as part of Raytheon's settlement agreement with the FAA. B.C. Ex. 8(s); B.C. Ex. 8(t).

37. Post Filing Events. Once the protest was filed, Ms. Wittie insisted that the Firm had to advise Lockheed. On May 24, Mr. Touhey called Susan Jaffe at the Gaithersburg offices of Lockheed, with whom he had been working on some matters. She told Mr. Touhey that she was aware of the filing and suggested he call Roger Hoover, General Counsel of Lockheed's Information Services division, and Ms. Lavan. Tr.-1 at 64. Mr. Touhey called Mr. Hoover and left a message, but, since he did not know Ms. Lavan, he asked Ms. Wittie to contact her. Ms. Wittie knew Ms. Lavan from Bar activities.

38. Ms. Wittie called Ms. Lavan on May 25 and told her that Respondent had filed the protest on behalf of Raytheon over Mr. Touhey's and her objections. Ms. Lavan told Ms. Wittie that she was surprised since she was aware of at least one matter the Firm was handling

for Lockheed.[12] Ms. Lavan stated that she thought the filing of the protest was a clear conflict and that no one had asked for Lockheed's consent.

39. Ms. Lavan testified at the hearing that she understood the difficulties law firms faced in dealing with large clients whose interests might be adverse and did not like to withhold consent when Lockheed was not adversely affected. She intimated that she might have consented to Respondent's representation of Raytheon had she been asked in advance.

40. After discussing the matter with other lawyers at Lockheed, Ms. Lavan called Ms. Wittie back and told her that the Firm's action was a clear conflict and that the firm had forced Lockheed's hand. Tr.-1 at 133. One option considered at Lockheed was to raise the conflict in the protest. Id. at 131.

41. On May 24, 1999, Ms. Wittie resigned from the Firm because of what she believed was its unethical conduct. B.C. Ex. 6(f). She had no plans as to how she might continue her practice. The Firm offered to allow her to use her office while she decided what to do.

42. On May 27, 1999, Mr. Touhey sent a Memorandum to Mr. Wilson, with a copy to all the members of the Firm, advising them that (a) he and Ms. Wittie had disclosed the Raytheon representation to Lockheed, (b) Mr. Maneker, Lockheed's General Counsel, was shocked and angry, (c) Ms. Lavan had advised that she was withdrawing all business from the Firm and was considering suing the Firm for damages and possibly filing a complaint with Bar Counsel, and (d) this result was precisely what he had predicted would happen. Mr. Touhey stated that he saw no alternative to his own withdrawal from the Firm. He continued:

[12] Ms. Wittie reminded her of the other matters the Firm was handling.

> Regardless of the value of the [Lockheed] account, any other course of action will destroy my reputation in the aerospace industry which has accounted for most of my revenue for my entire career. Even when I do resign, I doubt that the damage to my own reputation can ever be repaired. . . . I doubt that my career can be perpetuated; but I have no choice but to try. I don't see how I can even try if I remain associated with this law firm. In other words, regardless of whether I survive it, I need to make a definitive statement that I did not contribute to this debacle, which I did not, and that I do not approve of it.

B.C. Ex. 4(g) at 1. Mr. Touhey stated that he intended to resign, prepared a letter of resignation, and contacted lawyers in other firms. He never actually resigned from the Firm. He was hospitalized on August 18 and died in September.

43. On May 28, Ms. Lavan faxed a letter to Mr. Kilcullen discharging the Firm. In that letter, she reiterated her statements to Ms. Wittie. She wrote that Lockheed believed that the conflict in filing the Raytheon protest was clear and that it was considering several options, including suing for damages and filing a complaint with Bar Counsel. Respondent proposed sending a letter to Ms. Lavan, which he had drafted, protesting the Firm's innocence and offering to make a joint submission to Bar Counsel.[13]

44. Mr. Wilson did not respond to Ms. Lavan's discharge letter. He did send an e-mail to Mr. Kilcullen, who was in Europe, advising him of developments. On his return, Mr. Kilcullen wrote to Ms. Lavan apologizing and advising her that he was "sensitive" to her concerns and "mindful of the seriousness" of her allegations. B.C. Ex. 8(q). His letter continued: "I assure you that the firm does have conflicts review procedures in place, and as a direct result of your letter, we are thoroughly reviewing them to insure that all of our clients are

[13] Mr. Wilson had assumed responsibility for this matter because Mr. Kilcullen was in Europe attending to family matters.

fairly and loyally represented." Id. On the same date, Mr. Kilcullen notified the Firm's insurance carrier that Lockheed had asserted a claim that the Firm had violated the ethics rules.[14]

45. On July 7, 1999, Ms. Lavan filed a complaint with the Office of Bar Counsel. On July 10, Mr. Kilcullen advised Ms. Wittie that, because of the complaint, she would have to vacate the offices she was occupying immediately. Mr. Kilcullen indicated that she was responsible for the complaint, a view that he maintained during the hearing and that Mr. Wilson and Respondent shared. On July 13, Ms. Wittie left the premises and relocated to new offices.

46. Hearing Committee's Credibility Determinations. One important issue is whether Mr. Touhey in fact on April 19 "backed off" from his initial position on April 16 that there was or may be a conflict with his representation of Lockheed. As will be seen, the Hearing Committee did not find it necessary to reach a definitive conclusion on this point. The Hearing Committee explicitly rejected as not credible Mr. Wilson's testimony that he was told by Mr. Touhey there was no conflict. H.C. Report at 25.

47. The Committee found Mr. Wilson's testimony unreliable and lacking in credibility. The Committee stated:

> The Committee finds Mr. Wilson's testimony troublesome. He was halting and uncertain, frequently noting that he was not good with dates and often was unable to remember whether he had seen various documents, although conceding that if he had been copied he probably saw the document. In sum, his testimony was not forthcoming and the Committee does not have any confidence in his responses, particularly those relating to efforts to resolve the problem.

H.C. Report at 17.

48. The Hearing Committee was skeptical of Respondent's testimony that Mr. Touhey retreated from his position that the Raytheon representation presented a conflict. The Committee

[14] There is no evidence in the record that the Firm actually did anything in response to Ms. Lavan's letter other than notify its insurance carrier.

found that testimony "difficult to reconcile with the rest of the evidence in this record." Id. at 24. The Committee found his assertion inconsistent with testimony by Ms. Wittie and Mr. Touhey's wife, and contradicted by Mr. Touhey's memoranda of May 4, 8, and 23. Id. The Committee found Respondent's testimony on this issue "problematic," but concluded in its evaluation of sanctions that Respondent "honestly thought that Mr. Touhey had told him he could proceed with the Raytheon protest." Id. at 36.

49. The Committee found that Respondent's reluctance to notify Raytheon about the conflict was not motivated by a need to protect Raytheon in light of the approaching protest filing deadline, as Respondent had testified, but rather that the "more credible explanation" is that he was motivated by a concern that he might lose Raytheon as a client. Id. at 28. These observations by the Hearing Committee are important to our recommendation as to sanction, but we agree with the Committee that the question of violation does not turn on whether Mr. Touhey "backed off" his position that there was a conflict.[15]

III. ANALYSIS

The Hearing Committee found that Respondent violated Rule 1.7(b)(1) and (2); that he did not violate Rule 1.7(b)(3); and that Rule 1.10(a), which it found also to be violated, imposed no obligations in addition to those imposed by Rule 1.7. Bar Counsel filed no exceptions. Respondent excepted both as to the violations, findings and as to sanction.

Rule 1.10(a). We conclude that the Hearing Committee was correct in its understanding of Rule 1.10(a). Rule 1.10(a) implements the important principle that for conflict purposes, a firm is viewed as one lawyer, i.e., no lawyer in a firm may ethically represent a client which any other lawyer in the firm would be prohibited from representing. Accordingly, Rule 1.10(a) is

[15] The Hearing Committee recommended that Bar Counsel's Motion to Strike an affidavit submitted by Respondent with his Reply Brief be granted. We concur, grant Bar Counsel's motion and strike it from the record. Board Rule 7.14(a).

violated when a lawyer in a firm "knowingly" represents a client which another lawyer in the firm could not ethically represent.

While it makes no difference to the outcome here, since he soon became aware of the conflict, we do not necessarily agree with the Hearing Committee's observation that Respondent did not violate Rules 1.7 and 1.10 until he became aware that the Firm represented Lockheed. H.C. Report at 23. Comment 11 to Rule 1.7 is relevant to this question:

> . . . Unless a lawyer is aware that representing one client involves seeking a result to which another client is opposed, Rule 1.7 is not violated by a representation that eventuates in the lawyer's unwittingly taking a position for one client adverse to the interests of another client. The test to be applied here is one of reasonableness and may turn on whether the lawyer has an effective conflict checking system in place.

The District of Columbia's version of Rule 1.10 applies when the lawyer "knowingly" engages in a conflicting representation.[16] We think it clear, however, in light of comment 11 quoted above, that lawyers cannot avoid the consequences of Rule 1.10 by ignoring the Firm's internal conflict clearance procedures.

Here, Respondent commenced the representation of Raytheon without doing anything to determine whether there was a conflict. He did not telephone or e-mail his partners nor did he consult the Firm's database which, though not sophisticated, would have identified Lockheed as a Firm client. Respondent was made aware of the conflict by Mr. Touhey on Friday, April 16, 1999, two days after being contacted by Raytheon. At that point, Respondent had actual knowledge that one of his partners represented Lockheed in a matter pending before the ASBCA. Even if Respondent's testimony that Mr. Touhey "backed off" on Monday, April 19 were

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[16] California Rule 3-310 (Avoiding the Representation of Adverse Interests) and Illinois Rule 1.8 (Conflict of Interest: Prohibited Transactions) each refers to "when the lawyer knows or reasonably should know" about the conflict. See Cal.Rules of Prof'l Conduct R. 3-310 (2000); Ill. Rules of Prof'l Conduct R. 1.8 (2002).

accepted,[17] there is no question that Respondent was cognizant of the conflict by May 2, when he was confronted by Ms. Wittie and Mr. Touhey. After May 2, 1999, Respondent continued to work on the Raytheon matter, and refused requests of Mr. Touhey and Ms. Wittie that he disclose the conflict to Raytheon and seek a waiver. Therefore, after May 2, 1999, if not before, Respondent "knowingly" represented Raytheon in a conflict situation.

Rule 1.7(b)(1). There is no dispute that Respondent represented Raytheon in a matter in which it was taking a position adverse to the position of Lockheed, another Firm client.[18] We concur with the Hearing Committee that Respondent's arguments in defense have no merit.

Respondent accuses the Hearing Committee of blending what he sees as two distinct time periods. The first period runs from April 16, 1999, when the representation of Raytheon commenced, to May 2, 1999, when he spoke with Ms. Wittie about the Raytheon representation; this period includes the "gap" after Mr. Touhey allegedly "backed off" on April 19. The second time period starts on May 2, 1999, when – even accepting Respondent's position that Mr. Touhey had "backed off" on April 19 – it was clear that Ms. Wittie and Mr. Touhey believed there was a conflict.

April 16 - May 2. Unlike the Hearing Committee, we find that Respondent violated Rule 1.7(b)(1) starting on April 16 and continuing during the period after the alleged conversation in which Mr. Touhey "backed off." We do so because in our view, Respondent – once he knew the Firm represented Lockheed – was not permitted to rely on statements by Mr. Touhey which – even as testified to by Respondent – did not provide Respondent with the information necessary to determine that there was no conflict.

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[17] As noted, the Hearing Committee concluded that this testimony was "difficult to reconcile" with the other evidence in the record. H.C. Report at 24.

[18] Respondent acknowledges this. See Finding of Fact 28, n.7.

All of Respondent's arguments are predicated on his factual assertion that Mr. Touhey on April 19 retreated from his position that the representation of Raytheon created a conflict with Lockheed. Respondent's Reply Brief at 1-16. The Hearing Committee did not accept or reject that assertion, although it was skeptical. We share the Hearing Committee's skepticism of Respondent's testimony. We also conclude that Respondent's representation of Raytheon after his first conversation with Mr. Touhey on April 16 and after his conversation on April 19 violated Rules 1.10(a) and 1.7(b)(1).

Respondent contends that this case presents the novel issue of whether he was entitled to rely on Mr. Touhey's statement that he was "backing off." Specifically, Respondent poses the issues as follows:

> HEARING COMMITTEE MEMBER O'MALLEY: . . . Is it a fair summary of your testimony, and I think that this is perhaps your fundamental position, I'm asking, is this a fair summary of it, that on April 16 and April 19, after your discussions with Mr. Touhey, while it appeared to you that Lockheed Martin was a current client of Mr. Touhey, and that's what he was concerned about, that if, the client contact partner in the firm, decided and told you that there was not a problem, and he was backing off, that was all you needed to enable you to proceed.
>
> THE WITNESS: That's exactly what I'm saying.
>
> HEARING COMMITTEE MEMBER O'MALLEY: The representation of Raytheon.
>
> THE WITNESS: That's exactly what I'm saying.
>
> HEARING COMMITTEE MEMBER O'MALLEY: That is your fundamental position?
>
> THE WITNESS: Yes, sir. Like I said, maybe I'm wrong. I don't know.
>
> But that that stage, I didn't feel like I had to go check the database or the billing records.
>
> He was the guy that would know. I certainly didn't know.

Respondent's Brief at 11; Tr.-2 at 97-98.

The Hearing Committee correctly noted that there was nothing in the record to suggest that Mr. Touhey had authority to waive any conflict on behalf of Lockheed, and the testimony of all witnesses is clear that Mr. Touhey had not obtained a waiver from Lockheed. Further, as the Hearing Committee observes, Mr. Touhey would have risked running afoul of Rule 1.8 had he sought and received authority from Lockheed to waive conflicts on its behalf. H.C. Report at 26.

Certainly, a prudent attorney would not have taken Mr. Touhey's alleged statements at face value. As of April 19, Respondent understood from the conversation of two days before that Mr. Touhey represented Lockheed in a matter which though dormant was pending before the ASBCA. Lockheed was a Firm client. Had Respondent taken minimal conflict identification steps he would have learned that the Firm had recent billings to Lockheed on two matters. B.C. Ex. 3 (Invoices dated 2/16/99 (MARAD $2,696.34), 3/5/99 (MARAD $2,206.77), 4/13/99 (MARAD $6,439.42 and TASC $1,363.56)). Presumably, he would also have learned what Mr. Touhey stated in his May 4, 1999 memorandum, i.e., that the Firm represented three Lockheed divisions on four matters. B.C. Ex. 6(a). With that knowledge, Respondent would have known he could not ethically proceed unless and until he had waivers both from Lockheed and from Raytheon. Even if he had taken Mr. Touhey's alleged statement to mean that Mr. Touhey has obtained a waiver from Lockheed – or had somehow waived the conflict himself – Respondent was required to obtain a waiver from Raytheon.[19]

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[19] It is not clear that Respondent understood this. At the hearing, he stated:

> Q: So you thought the rules provided that you could take a position that was adverse to another client?
> Mr. Butterfield: As long as that attorney had told me that it was okay to do so, which is what he did.

Tr.-2 at 189-90.

Respondent cannot seriously contend that another lawyer's mistake would relieve him of the duty to avoid conflicts. At most, Mr. Touhey's "backing off," if it occurred, made the conflict more difficult for Respondent, Mr. Touhey and the Firm to resolve. Again, without the appropriate waivers from both clients, Mr. Touhey could not ethically represent Lockheed and Respondent could not ethically represent Raytheon.

Post-May 2, 1999. Respondent contends that his post-May 2, 1999 representation falls within the Rule 1.7(d) provision for conflicts not reasonably foreseeable at the outset of a representation. Respondent's Brief at 26-28. Rule 1.7(d) provides:

> If a conflict not reasonably foreseeable at the outset of a representation arises under paragraph (b)(1) after the representation commences, and is not waived under paragraph (c), a lawyer need not withdraw from any representation unless the conflict also arises under paragraph (b)(2), (b)(3), or (b)(4). (Amended, Oct. 15, 1996, effective Nov. 1, 1996.)

This rule offers no defense to Respondent, for several reasons. First, this conflict was "reasonably foreseeable" from the outset of the representation. It was disclosed to Respondent on April 16, 1999 and Respondent did nothing to flesh out or verify Mr. Touhey's statement – assuming it was made – that he was backing off. Comment 22 is unequivocal that a conflict is not unforeseeable simply because it is not identified:

> . . . Where a conflict is not foreseeable at the outset of representation and arises only under Rule 1.7(b)(1), a lawyer should seek consent to the conflict at the time that the conflict becomes evident, but if such consent is not given by the opposing party in the matter, the lawyer need not withdraw. In determining whether a conflict is reasonably foreseeable, the test is an objective one. In determining the reasonableness of a lawyer's conduct, such factors as whether the lawyer (or lawyer's firm) has an adequate conflict-checking system in place, must be considered.

Further, Rule 1.7(d) by its terms comes into play only if the affected clients refuse to grant waivers. Respondent refused to seek a waiver from Raytheon. Mr. Touhey and Ms. Wittie did not seek a waiver from Lockheed.[20] Plainly, Respondent cannot invoke Rule 1.7(d).

As a separate argument, Respondent contended before the Hearing Committee that by May 4, 2002, when according to him Mr. Touhey changed his position, Raytheon's protest deadline was so close that "Raytheon would have nowhere to go for adequate representation." Respondent's Reply Brief at 3. The Hearing Committee Report states that it "tend[ed] to believe" that Respondent's real reason for not advising Raytheon of the conflict was his concern about losing a potentially lucrative client. H.C. Report at 28.

Rule 1.7(b) is unequivocal and unambiguous. Its clear instruction that conflicts must be avoided is supported by Rule 1.16(a)(1), which requires a lawyer to withdraw from a representation if it "will result in violation of the Rules of Professional Conduct." As soon as he was aware of the conflict, Respondent was obliged to provide notice to Raytheon and seek a waiver, and to withdraw if waivers could not be obtained. He should have provided such notice on April 16 when Mr. Touhey first raised the issue. Instead, he logged more hours for his new client over the weekend.

Rule 1.7(b)(3). This rule prohibits a lawyer from representing a client when that representation "will be or is likely to be adversely affected by the representation of another client." The Hearing Committee concluded that Bar Counsel did not establish that the work for Raytheon affected the work for Lockheed on unrelated matters being performed at the time by Mr. Touhey and Ms. Wittie.

[20] Mr. Touhey and Ms. Wittie were understandably reluctant to advise Lockheed of the protest work for Raytheon without Raytheon's consent. No protest had been filed, and since Raytheon had not decided whether to file a protest, the Firm's representation of Raytheon was not public information. Raytheon might well have regarded the fact that it was contemplating a protest as a secret or confidence protected by Rule 1.6. The Firm could not advise Lockheed about this representation without Raytheon's consent.

We note, however, that the test is not just whether the representation of Lockheed was in fact adversely affected by the representation of Raytheon. The test is whether the representation of Lockheed was "likely to be adversely affected." But even under this standard, the record fails to establish a violation. There is nothing to suggest that the Firm's representation of Lockheed on the matters it currently handled was likely to be adversely affected by its representation of Raytheon.

Rule 1.7(b)(2). Bar Counsel's Specification of Charges did not enumerate Rule 1.7(b)(2), which prohibits a representation which "will be or is likely to be adversely affected by representation of another client." Citing the Board Report In re Hutchinson, Bar Docket No. 86-82 (BPR Jan. 25, 1985), Bar Counsel contended nonetheless that the Hearing Committee was authorized to find a violation of Rule 1.7(b)(2) and the Hearing Committee did so. H.C. Report at 27.[21] The violation here was in refusing to disclose to Raytheon that the Firm represented Lockheed. Disclosure to Raytheon was required by Rule 1.7(b)(3) to avoid a violation of Rule 1.7(b)(1), as well as by Rule 1.7(b)(2). As to the latter rule, disclosure of conflicts was part of his obligation to Raytheon, his new client. When Respondent failed to advise it that the Firm

[21] Bar Counsel argued that Respondent would not be prejudiced by such a finding since it was based on identical facts as were alleged and proved. Clearly the specifications charged Respondent with the facts which give rise to a Rule 1.7(b)(2) violation. This issue was identified in a colloquy between the Committee and Assistant Bar Counsel in her closing argument. Tr.-2 at 163-166. It was alluded to again at the conclusion of Respondent's closing. Id. at 190-91. Bar Counsel made its argument under the In re Hutchinson Board Report in its post-Hearing Brief. Bar Counsel's Post Hearing Brief at 35, n.15. Respondent did not object to the inclusion of this charge at any time before the Hearing Committee. In his exceptions to the Report, he stated that his main objection was to the sanction; he did not raise this issue before the Board.

The question was not decided in In re Hutchinson, 534 A.2d 919 (D.C. 1987) (en banc), cited by Bar Counsel, and the Court's recent decision in In re Slattery, 767 A.2d 203 (D.C. 2001), is controlling precedent. Clearly, the Specification alleged the facts necessary for a Rule 1.7(b)(2) violation, including the failure to advise, and obtain a waiver from, Raytheon. Specification, ¶ 8. While the Specification did not reference Rule 1.7(b)(2), it put Respondent on notice that failure to notify Raytheon was part of the violation alleged. Although Board Rule 7.1 specifies that the Specification must identify the rules alleged to be violated, Board Rule 7.19 allows the Hearing Committee to consider additional charges "after giving respondent reasonable notice and an opportunity to answer." We believe that such notice was given here and that consideration of Rule 1.7(b)(2) does not offend either Board Rules or due process, as explicated by the Court in In re Slattery, supra.

also represented Lockheed, he violated his duty to Raytheon. Without the necessary waivers, the Firm could not properly represent Raytheon in the protest. The Firm's representation of Lockheed gave Lockheed the opportunity, since waivers had not been obtained, to seek the disqualification of Respondent as counsel for Raytheon in the protest, clearly an adverse affect within the meaning of Rule 1.7(b)(2). Although it makes no difference as to sanction, we concur in the conclusion that Respondent violated Rule 1.7(b)(2).

IV. SANCTION

The Hearing Committee recommended a thirty (30) day suspension, the sanction urged by Bar Counsel. We agree that this is the appropriate sanction.

The Hearing Committee reviewed the necessary factors, i.e., (a) nature of the violation, (b) mitigating or aggravating circumstances, (c) the need to protect the public, the courts and the legal profession, and (d) the moral fitness of the attorney. E.g., In re Ryan, 670 A.2d 375, 380 (D.C. 1996); In re Hutchinson, 534 A.2d at 924.[22] The Hearing Committee noted its obligation not to recommend a disposition which would foster inconsistent discipline for comparable conduct. D.C. Bar R. XI, § 9(g).

(a) Nature of the Violation. This is a serious violation of Rule 1.7(b)(1). It was, in the Hearing Committee's words, "manifest and explicit." H.C. Report at 33. The conflict was identified (through no efforts of Respondent) on April 16, 1999, at the outset of the representation, and he plunged ahead anyway. Respondent prepared, and ultimately filed, a protest on Raytheon's behalf which sought the termination of a government contract held by another Firm client, Lockheed. We will treat aggravating factors below, but it is apparent from

[22] See also In re Jackson, 650 A.2d 675, 678, 679 (D.C. 1994) (per curiam) ("factors traditionally used": (a) prior discipline, (b) seriousness of the conduct, (c) prejudice to client, (d) violation of other provisions, (e) conduct involving dishonesty/misrepresentation, (f) Respondent's acknowledgment of wrongful conduct).

the record that Respondent acted with full knowledge of the facts showing the conflict and that he did so over the strong protest of at least two of his partners, Mr. Touhey and Ms. Wittie.

(b) Mitigating and Aggravating Circumstances. The Hearing Committee found lack of prejudice to the clients, Raytheon and Lockheed, to be the only mitigating circumstance. To this we would add that Respondent has no prior discipline, and that he cooperated with Bar Counsel.

Respondent contends that there are several additional mitigating circumstances: . . . that there was no moral turpitude on his part; that the facts presented a matter of first impression; that, as found by the Hearing Committee, he "honestly thought" Mr. Touhey told him he could proceed with the protest; and that, as also found by the Hearing Committee, he believed he was "acting in accordance with the Rules." Respondent's Brief at 30. We do not accept these as substantial mitigating factors.

The absence of moral turpitude is not a mitigating factor as to a Rule 1.7 violation. Once Respondent knew about the Firm's representation of Lockheed, his ethical duties were clear. Rule 1.7, as made applicable here to Respondent's representation of Raytheon by Rule 1.10, required Respondent to refrain from representing Raytheon without waivers from Raytheon and Lockheed as soon as he knew the Firm represented Lockheed. While the Court has considered a respondent's altruistic purpose as mitigation in a previous conflict case, In re Shay, 756 A.2d 465, 480-81 (D.C. 2000), the Hearing Committee found that his reluctance to advise Raytheon on the conflict was based on his concern about losing a new, potentially profitable client. While there is no moral turpitude here, nor is there any altruistic purpose.

The "first impression" argument is similarly unavailing, as is the Hearing Committee's conclusion that Respondent "honestly thought" Mr. Touhey told him he could proceed with the

protest. First, these purported mitigating factors are predicated on Respondent's contention that Mr. Touhey "backed off" on April 19, a factual contention which the Hearing Committee found "problematic." H.C. Report at 36. While the Hearing Committee did not reject that contention outright, it clearly did not accept it. Further, accepting these points as a mitigating factor would lend credence to Respondent's legal contention that he was free, after learning of the Lockheed representation from Mr. Touhey two days before, to accept Mr. Touhey's allegedly new position at face value, without further inquiry. We believe that Respondent was required to do more, i.e., to determine (a) whether Lockheed was a current, active client, (b) whether Mr. Touhey had obtained a waiver from Lockheed, or (c) whether Mr. Touhey had terminated Lockheed as a client in an ethically permissible manner.[23]

Similarly, the fact that Respondent believed he was acting in accordance with the Rules cannot be given substantial mitigating weight. Attorneys are required to understand and comply with the Rules of Professional Conduct. The conflict here was straightforward and unambiguous. That Respondent may have failed to fully comprehend the conflict rules as applicable here is, if anything, a factor in aggravation.

As the Hearing Committee found, there are substantial aggravating circumstances. Respondent utterly failed to utilize the Firm's database to determine the nature and extent of the Lockheed representation. He adamantly refused to inform Raytheon about the conflict, notwithstanding the fact that the conflict would give Lockheed the opportunity to seek Respondent's disqualification in the protest. He persisted in his refusal to take responsible action on the conflict notwithstanding the turmoil it was causing within the Firm, as evidenced by

[23] The "hot potato" rule limits the ability of a firm to terminate a client in order to "solve" a conflict situation. See Rule 1.16 and D.C. Legal Ethics Opinion No. 272, Conflicts of Interest: "Hot Potato."

Mr. Touhey's May 8 memorandum indicating he would need to leave the Firm if the protest was filed and the departure of Ms. Wittie. B.C. Ex. 6(c).

As did the Hearing Committee, we find Respondent's treatment of the Danish Aerotech conflict to be an aggravating circumstance. H.C. Report at 35. He did nothing to identify the conflict, and only sought the waiver after Ms. Wittie insisted that he do so. Further, his disclosure was either quite deceptive in its conclusion or reflected a considerable lack of understanding of conflicts. In a memo to Raytheon summarizing his disclosure, Respondent stated as follows:

> Phil, this will reduce to writing our conversation this morning on the topic of conflicts.
>
> On Sunday, May 2 – when I was in here redrafting the FAA protest – I happened into a conversation with Pat Wittie, who is a new member of this firm. Pat joined the firm on January 1 of this year.
>
> When she learned I was working for Raytheon, she raised a conflicts issue. Apparently, Pat is providing counsel to a Denmark company – Danish Aerotech – which is in the process of negotiating a contract with Raytheon. According to her the negotiations are ongoing but "difficult"; the negotiations may at some point in time "crater"; and that litigation could perhaps then ensue. I believe the Raytheon unit with which they are negotiating is Raytheon Missiles Systems.
>
> I told her this was speculative, remote and wholly unrelated to anything I was doing. In short, I told her that I saw no conflict, and that is my strongly held position to this day.
>
> In the interests of full disclosure, however, I brought it to your attention.

B.C. Ex. 8(b). The facts recited in the letter show a clear, existing conflict. Rule 1.7(b)(1) applies to matters which are not related; there was nothing speculative or remote about the conflict. Respondent's disclosure was not voluntary, as implied by the

letter, but rather was mandatory, since a waiver from Raytheon (and Danish Aerotech) was necessary for Respondent to continue working for Raytheon on the protest.[24]

Further, the Board finds it a significant and an aggravating circumstance that at the time of this disclosure, Respondent was fully aware of the Lockheed conflict and refused to disclose it. He disclosed one conflicting representation but failed to disclose the other, apparently because he feared that disclosure of the Lockheed conflict, which may have seemed more immediate, would result in his losing the protest work.

(c) Protection of the Public, the Courts and the Legal Profession. The Hearing Committee was appropriately concerned about Respondent's continuing inability to understand the conflict rules. The Hearing Committee cited Respondent's failure to comprehend that Rule 1.6, protecting client confidences and secrets, would prevent Mr. Touhey and Ms. Wittie from disclosing the Raytheon protest work to Lockheed without Raytheon's knowledge and consent. H.C. Report at 35. This, plus Respondent's head-in-the-sand response to the conflict, suggested to the Committee that the same or similar misconduct might occur in the future.

Respondent's contentions in his own defense in this proceeding should not be held against him in evaluating the appropriate sanction. But it is equally important that the sanction be designed to deter future violations. Respondent's actions at the time suggest a possibility of recurrence. Respondent was adamant in his refusal to deal with the Lockheed conflict. He exposed Raytheon to the possibility of a motion to disqualify him in the protest. His actions wreaked havoc within the Firm, forcing the departure of Ms. Wittie and causing Mr. Touhey also to decide to leave. All this was because he did not want to risk offending Raytheon, a new client

[24] Notably, Raytheon's response was to admonish Respondent to make disclosures in advance of taking on potential conflicting work. See Finding of Fact ¶ 17, n.3, supra.

he could not afford to lose, according to the Hearing Committee's conclusion, which is amply supported in the record.

The sanction in this case must be of sufficient severity to impress upon Respondent and other members of the Bar that the conflict rules must be followed scrupulously, notwithstanding that they at times do require attorneys to make hard choices with adverse personal financial impact.

(d) Moral Fitness. We agree with the Hearing Committee that the misconduct here does not reflect upon Respondent's moral fitness. We cannot second guess the Hearing Committee's conclusion that Respondent honestly believed Mr. Touhey had "backed off" and that he believed his conduct did not violate the Rules of Professional Responsibility. As noted above, however, we do conclude that his failure at the time to better understand the conflict rules, and his stubborn refusal to heed the vociferous complaints by Ms. Wittie and Mr. Touhey that he was in violation, are factors which need to be addressed in our sanction recommendation.

(e) Consistency with Sanctions in Comparable Cases. We agree that, in light of the nature of the violation and aggravating circumstances, a suspensory sanction should be imposed.

The Hearing Committee relied upon the Court's rulings in In re McLain, 671 A.2d 951 (D.C. 1996) and In re Ramos, No. 85-1644 (D.C. Sept. 16, 1986). The Court in In re McLain, ordered a ninety-day suspension for a respondent found to have violated the predecessor to Rule 1.8(a) when he borrowed money from clients, which he failed to repay, without advising them of the conflict, that his interests differed from theirs, or that they should seek advice from another attorney as to the transaction. In re McLain, 671 A.2d at 953-54. In In re Ramos, the Court imposed a six-month suspension on a respondent, without discipline for a similar violation, who

encouraged one client to invest in another client without disclosing that he represented both clients. In re Ramos, supra.

Bar Counsel acknowledged to the Hearing Committee that there were no District of Columbia cases involving similar facts and cited, in addition to McLain and Ramos, other conflict cases in which suspensory sanctions were imposed. See Bar Counsel's Post Hearing Brief at 38. These cases include In re Shay, 756 A.2d at 465 (ninety-day suspension for conflict and dishonesty but for altruistic purpose); In re Jones-Terrell, 712 A.2d 496 (D.C. 1998) (sixty-day suspension for conflict and other violations, including dishonesty, in representation of elderly, invalid client); In re James, 452 A.2d 163 (1982), cert. denied, 460 U.S. 1038 (1983) (two-year suspension for conflict and dishonesty).

Public censure has also been imposed for conflict violations, particularly in earlier cases. In re McGarvey, M-129-82 (D.C. Dec. 9, 1982) (public censure for conflict in representation of church); In re Hughes, M-80-81 (D.C. Oct. 28, 1981) (public censure for conflict and other violations for representation of both parties in a divorce proceeding). Informal admonition has been imposed in one conflict of interest case which has little bearing here. See In re Sofaer, 728 A.2d 625 (D.C. 1999) (former government attorney representation of party in connection with matter the same or substantially related to matter in which he participated while in the government).

In a recent case, In re Cohen, Bar Docket No. 280-97 (BPR July 31, 2002), the Board recommended a thirty-day suspension for a conflict of interest violation, occurring in the context of law firm practice, accompanied by a violation of Rule 5.1 resulting from conduct by a subordinate attorney in withdrawing a client's trademark application without authority, in violation of Rules 3.3(a) and 8.4(c). In In re Cohen, the respondent and his firm had come to

favor one client over another client in a joint representation in a trademark matter after disputes arose between the clients. Id. Continuing to represent both clients, Respondent's associate had withdrawn the trademark application of the disfavored client. Id. Suspension was recommended notwithstanding that, as here, there was ultimately no prejudice to the disfavored client, and, again like this case, the respondent had had no prior discipline and had cooperated with Bar Counsel. Id.

Based on its conclusion that the case involved a serious conflict of interest violation, finding no matters in aggravation and considering Respondent's lack of prior discipline and cooperation with Bar Counsel as matters in mitigation, the Board recommended a short, thirty-day suspension.[25] Id. We believe there is a substantial similarity between the misconduct here and that in In re Cohen. Both involved serious – and obvious – conflict situations. In each, one firm client was preferred over another based at least in part on economic considerations.[26] Both cases presented first-time violations by experienced, senior attorneys.

Our recommendation here, like the Hearing Committee's, is a thirty-day suspension. Notwithstanding that this case presents matters in aggravation not present in In re Cohen, we believe that a thirty-day suspension is sufficient to protect the interests of the court, the public and the legal profession.

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[25] Noting that the conflict violation was accompanied by Rule 5.1 violations, the Board stated in In re Cohen that it would recommend a thirty-day suspension based on the conflict violations alone. In re Cohen, Bar Docket No. 280-97 at 50.

[26] In re Cohen, the preferred client had been responsible for paying the firm's bills. In re Cohen, Bar Docket No. 280-97, at 8.

V. CONCLUSION

For the reasons stated herein, the Board respectfully recommends that Respondent be suspended for thirty days. The suspension should be deemed to commence for reinstatement purposes when Respondent submits the affidavit required by D.C. Bar Rule XI, § 14(g).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: _____
Timothy J. Bloomfield

Dated: June 10, 2003

All members of the Board concur in this Report and Recommendation, except Ms. Fort who has filed a concurring and dissenting statement in which Ms. Holleran Rivera joins.